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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHLSTEDMAN CO., et al.,
Respondents.

PETITIONERS' ANSWER TO MOTION OF RESPONDENTS TO DISMISS WRIT OF CERTIORARI, ETC.

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After the completion of petitioners' brief recently filed in this cause comes respondents' motion to dismiss and impels petitioners to file this further brief in opposition thereto.

Respondents' reasons (their brief 16-17) for the granting of their motion, though not substantial, are fully answered in Brief for Petitioners. We submit, however:

1. Respondents are mistaken about the facts being undisputed. Respondents themselves dispute the facts. But even if the *ex parte* character of the facts as they appear in the record, and their subsequent misstatement by respondents be for this purpose disregarded, the legal questions of jurisdiction and due process are substantial and in no sense trivial.

2. A substantial question of jurisdiction exists in this cause:

(a) This controversy is between two *strangers* to the bankruptcy proceeding as discussed in Brief for Petitioners at length on pages 14 to 18.

(b) The funds in controversy in this cause were not in *custodia legis* as we have pointed out at length in Brief for Petitioners, pages 24 to 30.

Respondents' contention that jurisdiction can be sustained on a theory of reclamation is not supported by a single reclamation case. In case at bar there was no possession sufficient to support reclamation proceedings, as shown in Brief for Petitioners, pages 30 to 34.

3. Neither the appeal to the Circuit Court of Appeals nor the petition for certiorari here was filed for delay. There are involved judicial conflicts and undecided questions of law. Petitioners are not mere stake-holders but trustees having rights and liabilities as such and in addition substantial individual interests exist in the fund. The Circuit Court of Appeals denied respondents' contention that the appeal was taken for delay. (Rec. 197.) There is no motive, nor could there be, and certainly no advantage to petitioners in the prosecution of their ap-

peal merely for delay. The importance of the questions involved, to say nothing of the heavy expenses incurred by petitioners, negatives any thought of appeal for mere delay.

4. Petitioners believe the Record discloses an abuse of discretion materially affecting their substantial legal rights as pointed out in Brief for Petitioners, pages 47 to 62.

5. The decision of the Circuit Court of Appeals presents important questions of general law that are in conflict with the decisions of several other circuits and of this court, as pointed out in our petition for certiorari, pages 8 to 12 and cases cited. There are in addition, questions of federal and bankruptcy law which this court has not as yet decided.

RE RESPONDENTS' MOTION TO AFFIRM.

Respondents have presented alternative motions: First, to dismiss the Writ of Certiorari already granted; second, to affirm the decision below. Inasmuch as the second can be disposed of rather summarily, brief attention is directed to it. Rule 7, subsection 4 of this court provides for a motion to affirm on two grounds only: First, "that it is manifest that the appeal is taken for delay only, * * *", second, "* * * or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. * * *"

It is apparent that respondents do not seriously seek to sustain either of the grounds they allege to exist. They direct no argument to the point dealing with delay. Moreover they specifically urged this argument of delay upon the Circuit Court of Appeals, and that court flatly held against them. (Rec. 167, 197.) There is nothing any-

where in the record, in respondents' statement of facts, or respondents' argument which indicates any motive for delay, any possible advantage in delay, or any conduct on the part of petitioners which would indicate any attempt to produce delay. Respondents merely shout, "delay", and pass on.

The alleged ground that no substantial questions requiring further argument are presented is untenable upon its face. A cursory inspection of petition for certiorari, particularly pages 7 to 12, as well as Brief for Petitioners, clearly refutes such argument.

Now, for the first time, respondents state the theory upon which they predicated jurisdiction; now they have decided that this controversy is a reclamation suit. (Their brief, page 22.) The necessity for, and relevancy of "further argument" with respect to this new contention is apparent, especially so by reference to Brief for Petitioners, pages 30-34. Necessity for "further argument" is obvious now in view of the fact that none of the cases cited by respondents, to sustain jurisdiction on the reclamation theory, are reclamation cases.

It is, therefore, clear that respondents' faint-hearted suggestion that the certiorari was sought for the purposes of delay, and that no substantial questions requiring further argument are involved, cannot be accepted; and this court should deny that alternative of the motion which seeks affirmation of the decision below.

RE RESPONDENTS' MOTION TO DISMISS.

The principal alternative of respondents' motion seeking dismissal of the Writ of Certiorari, is by their own statement based solely upon the proposition that your petitioners have misled this court by misstating the facts

of the present controversy. (Respondents' brief, page 3.) It therefore follows that if respondents' contentions of misstatement cannot be sustained, their entire motion falls. Let us consider these alleged instances:

Respondents object (page 13) to petitioners' reference to (Rec. 169) a form of separate written contract used for the employment of Odell as attorney for the contractors. (Appendix to Petition and to Brief for Petitioners.) This comment comes from respondents with decidedly poor grace in the light of the fact that George V. Dahl who signed the Appendix contract was the same George V. Dahl who swore under oath, that the contract signed by numerous contractors engaging Odell separately was a radically different form of contract. (Rec. 25.)

Respondents state (pages 13 and 14) that petitioners' statements of the *Blome* and *Herlihy* cases are untrue. We respectfully point out to the court the following significant language in the *Blome* case:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> *Reversed and remanded.*"

Blome Co. et al. v. *Ames,* 365 Ill. 456, 459-460.

The receiver in bankruptcy filed his answer in which he stated "that said opinion insofar as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners [respondents here] * * * and effected substantial tax savings."

Irrespective of later developments, it cannot be d puted that the $72,000 in question here was money sa to the contractors as a result of the decision procu by Odell in the *Blome* case.

In addition, the Supreme Court of the State of Illin later voluntarily made a further decision for the contr tors who were in the *Blome* case as follows:

> "* * * The *Blome* case involved 'contractors w agreed to furnish and install building materials a fixtures, to do excavating, make foundations, er buildings, and make various kinds of repairs to buil ings already built.' It is directly in point here. W have reconsidered in this opinion the reasoning up which part of that decision rests and no longer fe iimpelled to follow it. So far as that case appli to construction contractors who furnish labor a materials in excavating for basements, sewers, wat mains or other purposes, or in the erection of found tions or buildings, or in the making of various kin of structural repairs to buildings, the *Blome* case expressly overruled."
>
> *Herlihy* v. *Nudelman*, 367 Ill. 600, 605.

As a result of this second decision concerning the co tractors in the *Blome* case, they are now entitled to saving, not only of the 25% aforesaid, but to an add tional saving of 75% or total of 100% of the amount money deposited by them in escrow as sales taxes claim by the State. This total saving is made possible by special provision in the Retailers' Occupation Tax Act Illinois as follows:

> "CREDITS OR REFUNDS.
>
> "Section 6. If it shall appear that an amount tax, penalty or interest has been paid which w not due under the provisions of this Act, whethe as the result of a mistake of fact or an error law, then such amount shall be credited against a

tax due, or to become due, under this Act from the person who made the erroneous payment, of such amount shall be refunded to such person by the Department."

Smith-Hurd Illinois Statutes, Chap. 120, Sec. 445.

Further details of said litigation appear in the Record at pages 163 to 164.

Respondents have further objected (page 14) to petitioners drawing the Court's attention to the unusual manner in which the order of June 29, 1937, was obtained by counsel for respondents. Nowhere is this charge denied, nor can it be denied, and nowhere is it explained why this extraordinary method was resorted to.

Respondents assert (page 15) that there is no foundation in the Record for petitioners' statement that there was an agreement in open court that the question of the jurisdiction of the trial court over the 25% balance was expressly reserved. We refer the court to pages 93-94 of the Record which is a part of the pleadings of this case and also to the referee's finding concerning opposing counsel's own statement on this matter. (Rec. 62.) This question is treated at length on pages 34 to 40 in Brief for Petitioners.

Respondents object to petitioners' use of the word "abandoned" when applied to the Avery Brundage petition, and say that their second petition was supplementary to their first petition. An examination of the second petition, however, reveals that it does not incorporate by reference, any of the allegations of the first petition. (Rec. 69.)

Respondents object (page 15) to petitioners' contention that the Tax Service Association was a not for profit corporation. There is nothing in the record to indicate the District Court found the Tax Service Association

bankrupt. The alleged adjudication occurred *after* this controversy had been fully disposed of by the Circuit Court of Appeals. The record shows undisputably that the Tax Service Association was organized as a not for profit corporation under the Illinois Statute. (Rec. 6, 9.) The mere fact that the court transcended its jurisdiction and erroneously adjudicated the association does not, of course, preclude these petitioners from raising such jurisdictional question collaterally, inasmuch as it concerns jurisdiction of the subject matter. In any event, such adjudication by the District Court, right or wrong, is immaterial here because it occurred nine months after the entry of the erroneous order appealed from. It is the status at the time of the appeal July 12th and 13th, 1937, that is important and not what may or may not have happened later.

Thus, from the above enumerations, it appears that the so-called "misrepresentations" referred to by respondents do not exist. On the contrary petitioners' statements in their petition are fully borne out by the Record and fairly and accurately made.

RE RESPONDENTS' STATEMENT OF THE CASE.

Perhaps for the record some corrections should be made of inaccuracies that seem to have crept into respondents' brief. On page 6 respondents state:

> "On May 3rd an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a receiver."

In the first sentence of the next paragraph we find the following language:

> "Respondents' petition filed May 24, 1937, averred all of the foregoing facts * * *."

Nowhere in the entire petition is there any reference directly or indirectly to the filing of the involuntary petition. This device should not be permitted in a desperate attempt to remedy defects in respondents' petition. Such an allegation was indispensable and its omission fatal. (See petitioners' brief, 40-47.)

Respondents (pages 6 and 7) have added the words "agents of the alleged bankrupt" whenever they refer to Harris and Odell, petitioners herein, as though the continuous assertion would create such relation. The term "agents" is used by them not less than six times on pages 6 and 7 alone. Conspicuous by its omission is the name of the other escrowee, Craig. Respondents have remained discreetly silent concerning him and his position throughout their entire brief,—and small wonder. It is clear that Craig had as much control over the fund as Harris and Odell and not one cent of the funds could be released without his approval and signature. Craig never had any connection with the alleged bankrupt. Respondents say (page 5):

> "In acting as custodian of the funds, Harris and Odell were not acting as individuals but as representatives and agents of the bankrupt for the purpose of carrying out the agreement of April 9, 1935, between the respondents and the bankrupt."

They very conveniently omit part of their own allegations previously made in the Avery Brundage petition (Rec. 28) as follows:

> "In signing said letter to the National Builders Bank of Chicago, aforesaid, dated May 2, 1935, said Craig, Harris and Odell were acting as the agents and representatives of the petitioners [respondents here] * * * "

Respondents say (page 5) that Odell was not to get any money even if the litigation was successful. This

assertion ignores not only the separate contracts of the individual contractors with Odell (Rec. 25 and petitioners' brief Appendix); but the common sense inference arising from the fact that attorneys do not often engage in prolonged, arduous litigation gratuitously.

Respondents say (page 11) that on June 29th there was no question of bankruptcy jurisdiction before the court and hence no question was presented by Harris' and Odell's motion to strike respondents' petition of June 29th. They conveniently ignore the fact that the bankrupt had raised the question of the jurisdiction of the subject matter of the bankruptcy court over a "not for profit" corporation, and that by the referee's report, the bankrupt's motion to quash, raising that question, was ordered to stand as an answer to the involuntary petition. (Rec. 68.) Thus, the question of the jurisdiction of the bankruptcy court was pending undetermined at the time of the filing of the Dahl-Stedman petition, and respondents are mistaken.

Respondents (page 5) say "the bankrupt and Odell" instituted a suit for the contractors. The bankrupt was not, nor could it be, a party to the Sales Tax litigation nor was it Odell's client at any time.

Respondents say (page 3) there are no "disputed facts". Such an assertion is unwarranted. Petitioners were precluded from filing any answer to the merits and, hence, were unable to file any pleadings contradicting "facts" alleged by the respondents' pleadings.

Respondents say (page 5) "at the time respondents filed their original petition on May 24, 1937, the bankrupt, through its agents Odell and Harris, had control and custody of the Escrow Funds, although none of them were then acting for these respondents in any capacity." This assertion is utterly unsupported and is disputed.

If affirmatively appears from the respondents' own petition that the funds were in the custody and control of Craig, Harris and Odell. (Rec. 28.) No demand was ever made upon the bankrupt, but it is alleged demands were made on Harris and Odell, individually, and that they were requested to cease from acting as the agents of respondents.

RE RESPONDENTS' ARGUMENT ON THE LAW.

Although respondents' motion to dismiss the certiorari is, by their own statement, based solely on their contention that petitioners misrepresented the facts, and although such contention has been shown to be without merit, petitioners direct brief attention to some points of law involved in respondents' brief.

Petitioners' brief (pages 12-24) shows conclusively that the court did not have jurisdiction of the subject matter in case at bar; and (pages 27-34) that the court did not have possession, control or custody in any way of the funds in question; and (pages 24-27) that none of the escrowees was an agent of the bankrupt in case at bar.

The authorities cited by respondents (page 18 of their brief) from *Page* v. *Arkansas* to *Remington on Bankruptcy* are all based on the theory that the court had undisputed jurisdiction and also had possession, control or custody and were not cases where there were disputes with respect to either possession or agency.

Respondents have argued (page 22) that their action in essence is "a simple reclamation suit". Yet not one of the cases cited in support of jurisdiction is a reclamation suit. All the cases cited on page 18 of their brief are cases in which a trustee is seeking to have a third party turn over property to the bankruptcy estate—all

"turnover" proceedings. Even in a "turnover" proceeding where property is sought to be recovered from a mere agent of the bankrupt, it is absolutely essential that such agent hold the property exclusively and unconditionally subject to the bankrupt's orders. The property was not so held here. Moreover, "such property" must be other than a chose in action. The property here in litigation was a mere chose in action. (See petitioners' brief, pages 27-30.)

In case at bar, property was not in the actual or even constructive control of the bankrupt nor of any agent but in the actual exclusive, undivided possession of three independent trustees, utter strangers to the bankruptcy proceeding, and not any one of which trustees had individual or absolute control.

The cases cited by respondents on page 19 of their brief are not in point because they do not involve the issues of the case at bar, that is lack of jurisdiction over the subject matter. Respondents have quoted on page 29 a decision citing Freeman on Judgments to support their contention on the matter of judgment by consent. Had they turned to Volume One of the same text (Freeman on Judgments, Vol. 1, Sec. 337) they would have found:

> "Jurisdiction of the subject matter is essential in every case; a condition precedent, in a way, to the acquisition of authority over the parties. * * *
>
> Jurisdiction of the subject matter has reference to the nature of the cause of action or the relief sought. * * * As power over the subject matter is given by law, nothing but an additional grant from legislative authority can extend that power over a class of cases formerly excepted; and neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act."

It being impossible, therefore, to confer jurisdiction as to the subject matter on the trial court by consent, the so-called consent by respondents becomes immaterial. Petitioners were not the ones who invoked the jurisdiction of the court and, consequently, estoppel cannot apply. Furthermore, in the interim, there had been no reliance upon any act of petitioners and no damage had resulted to respondents, both of which are essential elements of estoppel.

Respondents question petitioners' "appealable interest." Petitioners are not mere stakeholders. They have substantial duties to perform and one of the petitioners has an individual interest and claim as well as a trustee's interest. In addition, all of the escrowees are trustees for many contractors other than those involved in this proceeding, who have deposited in said fund and have interests therein that may conflict with the interests of respondents. Such contractors, not being made parties to this proceeding, will likewise be deprived of property without due process of law.

Even if petitioners were mere stakeholders and had no interest, respondents are estopped from asserting that there is no appealable interest. As was said in *State* v. *Cranney*, 30 Wash. 594, 71 Pac. 50:

> "The respondents move to dismiss the appeal herein for the reason that the appellant has no appealable interest in said cause. There seems to be nothing in this motion. If a party has sufficient interest to make him a party to an action, he has sufficient interest to appeal should the judgment be against him."

See also:

Carroll v. *Fowler*, 33 S. D. 303, 145 N. W. 545.

Marion County v. *Wilson*, 105 Ky. 302, 49 S. W. 8.

State v. *Rombotis*, 120 La. 150.

Respondents, having made your petitioners parties to this proceeding, cannot now contend that there is no appealable interest. Petitioners were indispensable parties had jurisdiction existed.

All of the cases cited by respondents, are cases in which the parties did not have or claim an interest, and they could not be affected one way or another by the decision of the court. Respondents have said nothing to this court about the expenses to which the petitioners have been subjected in having been made defendants in this suit, nor have they mentioned the assessment of interest against them by the Circuit Court of Appeals. Certainly these alone would create an appealable interest.

Respondents' argument that petitioners have no appealable interest operates rather curiously with respect to that portion of the appeal based upon denial of a hearing on the merits. Respondents contest the right to appeal on the theory that the record shows no appealable interest, whereas the very thing being appealed from is the denial to petitioners of an opportunity to introduce into that record evidence showing *inter alia* such an appealable interest.

Respondents have contended (page 35 of their brief) that a trustee, even though an attorney in litigation as well, has no lien for his attorney's fees out of retained funds and they quote in support *Story* v. *Hull* (143 Ill. 506), an Illinois case which was decided in 1892 before the attorneys' lien law in Illinois went into effect in 1909, and the case, in any event, is not applicable here as the facts are different. In their argument and citations on the matter of Odell's lien for fees, they have ignored the separate contracts of engagement between the contractors and Odell which they well know exist. (Petitioners' brief, page 64.) In this connection we should bear in mind

that petitioners have not been given an opportunity to be heard on the merits and to present their rights and facts, and the circumstances concerning the creation and distribution of the escrow fund.

Respondents (on page 35 of their brief) have asked why petitioners consented to the payment of moneys to the State out of the Escrow Fund when there were injunctions in force and effect against petitioners. The answer is that the State was not a party to that injunction and part of the funds were held for it and there was an order in the Circuit Court of Cook County directing the payment of said funds to the State of Illinois (the principal beneficiary of the fund) in order to avoid the $100,000 penalty. Also all parties in interest in the injunction matters expressly consented to the payment of the funds to the State of Illinois, as provided by the District Court's order.

CONCLUSION.

It being apparent that this appeal was not taken for delay and substantial questions of law, involving conflicts between circuits and with this court, and several important undecided questions of bankruptcy and federal law being present, the motion of respondents to affirm should be denied. Since it appears that the facts were properly stated to the Court in petitioners' original petition for certiorari, and inasmuch as no substantial ground, in fact or law, is advanced by respondents for altering the Writ of Certiorari, respondents' motion to dismiss should likewise be denied.

Respectfully submitted,

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